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LEVI STRAUSS & CO.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LEVI STRAUSS & CO.,

Plaintiff,

v.

FIVE FOUR CLOTHING, INC.,

Defendant.

Case No. C 08-0478 MHP

**JOINT CASE MANAGEMENT
STATEMENT AND [PROPOSED]
ORDER**

CMC Date: July 7, 2008
CMC Time: 4:00 p.m.

Plaintiff Levi Strauss & Co. ("LS&CO.") and defendant Five Four Clothing, Inc. ("Five Four") jointly submit this Case Management Statement and Proposed Order.

1. Jurisdiction and Service.

LS&CO.'s first, second and third claims arise under the Lanham Act. This Court has subject matter jurisdiction over those claims pursuant to 28 U.S.C. §§ 1331, 1338(a) and 1338(b) and 15 U.S.C. §1121, and supplemental jurisdiction over LS&CO.'s state law claims pursuant to 28 U.S.C. §1367. No issue exists as to personal jurisdiction or venue, and no parties remain to be served.

2. Facts and Bases for Claims and Defenses.

Plaintiff's Claims: LS&CO. is a Delaware corporation which has its principal place of business in San Francisco, California. LS&CO. is the sole owner of the Arcuate Stitching Design Trademark ("Arcuate Trademark"), which LS&CO. has used continuously in interstate commerce

1 since 1873 and which is the oldest apparel trademark still in use in the United States. The Arcuate
 2 Trademark is federally registered and incontestable. Examples of LS&CO.'s use of the Arcuate
 3 Trademark on jeans are attached as Exhibit A to the Complaint, and LS&CO.'s federal and California
 4 registrations for the Arcuate Trademark are attached to the Complaint as Exhibit B.

5 Five Four Clothing, Inc. is a California corporation with its principal place of business in Los
 6 Angeles, California. Five Four manufactures, distributes, and sells jeans and other apparel under the
 7 brand name FIVE FOUR bearing a number of stitching designs that LS&CO. believes are confusingly
 8 similar to its Arcuate Trademark and violate LS&CO.'s rights in its mark. LS&CO.'s complaint states
 9 claims against Five Four for trademark infringement, dilution and unfair competition under federal
 10 and California law.

11 Defendant's Defenses: Five Four Clothing was founded in 2002, is based in Los Angeles, and
 12 designs and distributes its own unique clothing. All of Five Four's products bear the distinctive Five
 13 Four Marks, many of which are registered with the USPTO.



19 Contrary to Levis' allegations, Five Four's jeans do not infringe upon Levis' intellectual
 20 property. Five Four goods are marketed under the Five Four brand name, the jeans are clearly
 21 identified as Five Four, and they retail for \$145.00 a pair whereas Levis retail for \$45 a pair.
 22 Furthermore, there is no overlap as to channels of trade. Five Four products are typically sold in
 23 boutique outlets such as Fred Segal. On the other hand, Levis' products are sold in Levis stores where
 24 Five Four products are not available. Thus, there is no likelihood of confusion. [*Sleekcraft*]

25 Even in the unlikely event that the jeans in Exhibit C to the Complaint could be deemed
 26 confusing, Levis would be unable to obtain damages because Five Four's jeans were not "willfully
 27 calculated to exploit the advantage of an established mark." [*See Lindy Pen Co. v. Bic Pen Corp.*, 982
 28 F.2d 1400, 1405, 1407-8 (9th Cir.1993)] Levi's claim for injunctive relief is also moot because Five

Four ceased using the jeans depicted in Exhibit C prior to the lawsuit being filed. [*See Polo Fashions, Inc. v. Dick Bruhn, Inc.*, 793 F.2d 1132, 1135 (9th Cir.1986)].

3. Issues in Dispute.

The issues (both factual and legal) set forth below are not meant to be final or exhaustive, and the parties reserve their rights to reformulate these issues or include other appropriate issues as they develop or become known to the parties through the course of discovery and investigation.

Furthermore, the characterization of an issue as “factual” or “legal” is not necessarily a concession that it is not the other or both.

Factual Issues:

a. Whether Five Four’s manufacture, distribution, and/or sale of products bearing the stitching designs at issue is likely to cause confusion, mistake or deception among consumers and potential consumers.

b. Whether Five Four’s manufacture, distribution, and/or sale of products bearing the stitching designs at issue dilutes or is likely to dilute LS&CO.’s Arcuate Trademark.

c. Whether and to what extent LS&CO. has been damaged by Five Four’s manufacture, distribution, and/or sale of products bearing the stitching designs at issue.

Legal Issues:

a. Whether Five Four’s manufacture, distribution, and/or sale of products bearing the stitching designs at issue constitutes infringement and dilution of LS&CO.’s Arcuate Trademark and unfair competition under the federal Lanham Act, 15 U.S.C. § 1051 *et seq.*

b. Whether Five Four’s manufacture, distribution, and/or sale of products bearing the stitching designs at issue constitutes trademark infringement and unfair competition under California common law and/or Cal. Bus. & Prof. Code §§ 14320, 17200 *et seq.*, and dilution of LS&CO.’s Arcuate Trademark under Cal. Bus. & Prof. Code § 14330.

c. Whether LS&CO. is entitled to an accounting and recovery of Five Four’s profits on account of the infringement under the federal Lanham Act, 15 U.S.C. § 1117(a) and/or common law.

1 **4. Motions.**

2 The parties anticipate that they may file dispositive motions, depending on the evidence that is
3 produced during the discovery process.

4 **5. Amendment of Pleadings.**

5 LS&CO. does not anticipate amending its complaint. Five Four has not yet appeared in this
6 action.

7 **6. Evidence Preservation.**

8 LS&CO. has taken steps, including the suspension of normal document destruction programs
9 and placement of a litigation hold for documents, including electronically stored documents, to
10 preserve evidence relevant to the issues reasonably evident in this action, including interdiction of any
11 document destruction program and any ongoing erasure of emails, voice mails and other electronically
12 recorded materials.

13 Five Four is in the process of gathering information in connection with this matter. It has not
14 altered or otherwise destroyed any evidence.

15 **7. Disclosures.**

16 The parties have not yet exchanged their Rule 26 initial disclosures.

17 **8. Discovery.**

18 The parties expect to agree upon a stipulation regarding the entry of a protective order
19 governing documents and information to be disclosed in the course of this litigation. Thereafter, the
20 parties anticipate exchanging document requests and other written discovery and cooperating in
21 arranging depositions of pertinent party and non-party witnesses. The parties do not propose any other
22 changes with regard to the timing, form, or requirement for disclosures under FRCP Rule 26(a). The
23 parties have not agreed to any limitations on the subject matter of discovery, and are to complete
24 discovery within the time limits to be set by the court. Should the need arise at a later date to amend
25 these deadlines, they may be modified by stipulation and order or motion supported by good cause.

26 **9. Class Actions.**

27 This is not a class action.
28

10. Related Cases.

There are no related cases pending in this Court.

11. Relief.

Pursuant to 15 U.S.C. § 1117(a), LS&CO. will seek damages in the amount of Five Four's profits from the sale of infringing goods. Given that discovery with respect to damages has not yet begun, LS&CO. is unable to compute damages at this time. LS&CO. may seek recovery of extraordinary damages and recovery of its attorneys' fees in the event that discovery shows Five Four's conduct to have been willful. LS&CO.'s complaint also seeks injunctive relief.

Five Four will seek a declaration that none of its merchandise infringes on Levis' intellectual property.

12. Settlement and ADR.

The parties request referral to mediation as their ADR process.

13. Consent to Magistrate Judge For All Purposes.

Five Four does not consent to a magistrate judge.

14. Other References.

The parties do not believe the case is suitable for reference to binding arbitration, a special master or magistrate judge, or to the Judicial Panel on Multidistrict Litigation.

15. Narrowing of Issues.

The parties do not believe that the issues in dispute can be narrowed.

16. Expedited Schedule.

The parties do not believe that this type of case can be handled on an expedited basis with streamlined procedures.

17. Scheduling.

The parties propose the following discovery and court dates:

Fact Discovery Cutoff:	December 19, 2008
Expert Disclosures:	December 19, 2008
Rebuttal Expert Disclosures:	January 23, 2009
Expert Discovery Cut-off:	February 13, 2009

Last Date for Filing of Dispositive

Motions: March 4, 2009

Final Pretrial Conference Date: May 13, 2009

Trial Date: May 18, 2009

18. Trial.

The parties expect that the trial will last five to seven court days. LS&CO. has demanded a jury. The parties do not believe bifurcation is a viable alternative in this case.

19. Disclosure of Non-party Interested Entities or Persons.

LS&CO. has filed the "Certification of Interested Entities or Persons" required by Civil Local Rule 3-16 certifying that other than the named parties there are no other interested entities or persons.

20. Other Items.

None.

DATED: June 27, 2008

Respectfully submitted,

By: /s/ Gia Cincone
 Gia Cincone
 TOWNSEND AND TOWNSEND AND CREW LLP
 Attorneys for Plaintiff
 LEVI STRAUSS & CO.

DATED: June 27, 2008

By: /s/ Brent H. Blakely
 Brent H. Blakely
 Attorneys for Defendant
 FIVE FOUR CLOTHING, INC.

IT IS SO ORDERED.

DATED: _____, 2008

 Hon. Marilyn Hall Patel
 United States District Judge

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